warn airline passengers about the dangers of DVT." (Court of Appeals Decision, p. 2)

The Court of Appeals affirmed the judgment of the trial court stating, "We affirm the judgment because we conclude that Miezin's claim, based solely on a state common law negligence theory, is *impliedly preempted* (emphasis supplied) by the Federal Aviation Act of 1958, 49 U.S.C. § 40101, et seq." The Decision also stated that the Court of Appeals did not consider whether Miezin's claim is also expressly preempted by the preemption provision of the Airline Deregulation Act of 1978, 48 U.S.C. § 41713(b)(1). (Appeals Decision p. 2)

In addition the Court of Appeals questioned "whether, in the absence of preemption, Wisconsin common law would impose on airlines a duty to warn their passengers about the dangers of DVT basing that conclusion on *State v. Blalock*," 150 Wis. 2d 688, 703, 442 N.W. 2d 514 (Ct. App. 1989)." "Courts must decide on the narrowest possible grounds."

The Court of Appeals also concluded that Patricia Miezin's claims for loss of consortium would fail on the same grounds as above.

BACKGROUND

After his return to Milwaukee, Jerome Miezin experienced pain in his leg. On October 27th Miezin was diagnosed with DVT, a clotting condition that develops in the deep veins of the lower extremities. Doctors also determined that Miezin has a "factor V Leiden" genetic condition which predisposes him to blood clots. It is undisputed

that Miezin did not know that he had this genetic condition until he was diagnosed with DVT, which occurred after he completed the flights. (Appeals Decision, p. 3)

Miezin then filed this action, alleging that he suffered permanent disability and disfigurement (a permanently swollen leg) as a result of the DVT which he claimed he developed because Midwest negligently failed to advise him to get up and move about the cabin of the aircraft and to do those other things listed on p. 4, Paragraph 5, of the Court of Appeals Decision, which would have helped him avoid blood clots.

Midwest moved for summary judgment and the trial court granted the motion, concluding that Miezin's state common law negligence claim was preempted by the Federal Aviation Act and in the alternative, that Midwest had no duty under Wisconsin common law to warn airline passengers about the dangers of DVT. The appeal followed.

DISCUSSION

Miezin argued that his State common law negligence claim was not preempted by Federal law and that under Wisconsin's common law, Midwest had a duty to warn its passengers about the dangers of DVT. The Court of Appeals concluded "that Miezin's claim is *impliedly preempted* (emphasis supplied) by the Federal Aviation Act and therefore affirmed the judgment. The Court of Appeals stated, "A fundamental principle of the constitution is that congress has the power to preempt state laws." Citing *Crosby v. National Fair & Trade Council,* 530 U.S. 363, 372 (2000) but then stated "however, analysis of preemption claims begins with the presumption that 'congress

does not intend to supplant state law", *New York State Conference of Blue Cross and Blue Shield Plans and Travelers Insurance Company*, 514 U.S. 645, 654 (1995).

The United States Supreme Court has recognized three methods by which congress can exercise its preemptive power: express preemption, implied field preemption, and implied conflict preemption. Express preemption occurs when congress enacts an express provision for preemption in any congressional act. See *Crosby*, 530 U.S. at 372 (2000).

Under implied field preemption, congress can impliedly preempt state law if "Federal law so thoroughly occupies a legislative field as to make reasonable the inference that congress left no room for the states to supplement it." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

Finally, implied conflict preemption will be found "where state law stands as an obstacle to the accomplishment and execution of the four purposes and objectives of congress." *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 98 (1992).

Petitioner would argue that implied field preemption is the weaker of the three classes in that what is implied can vary from interpreter to interpreter while the other two classes may be understood by their words alone.

Numerous courts have addressed whether the Federal Aviation Act impliedly preempts state common law negligence claims brought by airline passengers. In one such case, the Third Circuit Court of Appeals found implied Federal preemption of "the entire field of aviation safety." See *Abdullah v. American Airlines, Inc.*, 181 F.3d 363,

365 (3rd Cir. 1999). At issue in *Abdullah* was an allegation that American Airlines was liable under territorial (Virgin Islands) common law for injuries passengers sustained when their aircraft encountered severe turbulence. The passengers allege that the pilot and the flight crew were negligent in failing to avoid the turbulent conditions and to "give warnings reasonably calculated to permit plaintiffs to take steps to protect themselves." (Appeals Decision p. 6)

The court concluded that the Federal Aviation Act and relevant Federal regulations establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation, by jurisdictions. The court explained:

> "Because of the need for one, consistent means of regulating aviation safety, the standard applied in determining if there has been careless or reckless operation of an aircraft should be Federal; state or territorial regulation is preempted." (Appeals Decision p. 6)

However, Wisconsin Appeals Court noted that, in *Abdullah*, the plaintiffs were not barred from pursuing state and territorial law remedies based on allegations that Federal standards of care were violated. The court held:

> "Even though we have found Federal preemption of the standards of aviation safety, we still conclude that the traditional state and territorial law remedies continue to exist for violation of those standards." (Appeals Decision p. 7)

It appears that the court in *Abdullah* limited the preemption in that case to "liability" but refused to apply

the preemption to damage claims. In other words the court gave *Abdullah* "half a loaf" rather than barring him completely.

A newer Federal case was cited by the Court of Appeals, *Sakellaridis v. Polar Air Cargo, Inc.*, 104 F. Supp. 2d 1960 (E.D. N.Y. 2000), recognizing that the Second Circuit, in contrast to the Third Circuit, has held that the Federal Aviation Act does not preempt state common law claims.

The Seventh Circuit has acknowledged broad preemption by the Federal Aviation Act in other contexts. See *Deahl v. Air Wisconsin Airlines Corp.*, 03C5150, 2003 WL 22843073, at *2 (N.D. Ill. Nov. 26, 2003).

Our Appeals Court cites *Bieneman v. City of Chicago*, 864 F. Supp. 463, 471 (7th Cir. 1988); and *In Re Lawrence W. Inlow Accident Litigation*, No. Ip 99-0830-C H/G, 2001 WL 331625 at *15 n. 11 (S.D. Ind. Feb. 7, 2001) regarding inadequate equipment cases. (Appeals Decision p. 7)

The Seventh Circuit has not addressed Federal Aviation Act preemption recently, although it has acknowledged the broad preemptive scope of the act in a different context citing *Kohr v. Allegany Airlines, Inc.*, 504 F.2d 400, 404 (7th Cir. 1974).

Further, the Court of Appeals said: "Although there are conflicts among courts in the general application of implied preemption by the Federal Aviation Act, the only two cases of which we are aware that involve DVT warnings to airline passengers found implied preemption of state common law standards of care. See *Witty v. Delta Airlines, Inc.*, 366 F.3d 380 (5th Cir. 2004); and *In Re Deep Vein Thrombosis Litigation*, No. MDL 04-1606 DRW, et al, 2005 WL 591241 (N.D. Cal. 2005)."

In *Witty*, the court stated, "with respect to the failure-to-warn allegations, that the 5th Circuit concluded that field preemption and conflict preemption are both applicable, because there exists a comprehensive scheme of Federal regulation, and the imposition of state standards would conflict with the Federal law and interfere with Federal objectives." *Witty* at 384. "Congress intended to preempt state standards for the warnings that must be given airline passengers." (Appeals Decision p. 8)

Petitioner admits that he has not covered the field of DVT litigation, but there is sufficient evidence that there exists a hodge podge of findings including, that there is no preemption of DVT warnings in the Federal Aviation Act (*Sakellaridis*) or that there is partial preemption of such a claim, preempting the issue of liability but not the issue of damages (*Abdullah*) or that "congress intended to preempt state standards for the warnings that must be given airline passengers" in *Witty v. Delta Airlines*.

Petitioners recognize that there are many specific areas in which the airlines are required to warn passengers in specific instances, such as remaining seated and belted during turbulence and take offs and landings and were warned not to smoke at any time but significantly there is no individual warning in the Federal Aviation Act directing the airlines to warn passengers of the dangers of DVT. With the number of specific warnings in the Federal Aviation Act and having left out any reference to a DVT warning we must recognize that congress, when passing and amending the Act, had to be aware of the fact that DVT warnings were not included.

Included in the record is Dr. Larry S. Milner's Affidavit and research paper entitled "The Relationship Between

Deep Venous Thrombosis and Air Travel" states that a review of the paper will show that DVT is widespread, recognized by many airlines around the world and has been a serious problem with airlines for years. If one didn't know better it almost looks like many courts are intentionally covering up this hazard for the benefits of the various airlines.

DENNIS BATES, ET AL, PETITIONERS
V. DOW AGROSCIENCES LLC
NO. 03-388
SUPREME COURT OF THE UNITED STATES
125 Supreme Court 1788; 161 Lawyers Edition L. Ed. 2nd 687; and 2005 U.S. Lexus 3706
Argued: January 10, 2005
Decided: April 27, 2005

A brand new U.S. Supreme Court case cited in the heading of this section may go a long way toward resolving the clash of Federal preemption with state statutes.

Some Texas peanut farmers alleged in the action that their crops were severely damaged by the application of respondent's (Dow) "Strong Arm" pesticide which the Environmental Protection Agency (EPA) registered pursuant to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act. (FIFRA)

The farmers gave notice to Dow of their intent to sue, claiming that Strong Arm's label recommended its use in all peanut growing areas when Dow knew or should have known that it would stunt the growth of peanuts in their soil, which had pH levels of at least 7.0.

In response Dow sought a declaratory judgment in the Federal District Court asserting that FIFRA preempted petitioners' claims.

Petitioners counterclaimed, raising several state-law claims sounding in strict liability, negligence (torts), fraud and breach of express warranty. The District Court rejected one claim on state-law grounds and found the others barred by FIFRA's preemption provision. 7 U.S.C. § 136v(b).

JUSTICE STEVENS delivered the opinion of the Supreme court. He stated that the question presented is whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) 7 U.S.C. § 136 et sequitur (2000 Ed. and Supp. II), preempts their state law claims for damages.

For clarity, in this Petition, petitioner suggests that the court substitute the Miezins in place of the peanut farmers and substitute Midwest Airlines in place of Dow Agrosciences for a better understanding of why the Miezins are citing this case.

(As an aside, petitioners in this case state that it is understandable that the Wisconsin First District Court of Appeals may not have heard of or read the *Bates* case as it was not decided until April 27, 2005; nevertheless the *Bates* case was available some 20 days before the Court of Appeals issued its Decision.)

Affirming the Federal District Court, the Fifth Circuit held that § 136v(b) expressly preempted the state-law claims because a judgment against Dow would induce it to alter its product label.

However, in this most recent U.S. Supreme Court decision to address preemption of state failure to warn claims, *Bates v. Dow Agrosciences LLC*, cited above, the court held that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not preempt state-law tort

claims, despite pervasive federal regulation of the field including requirements as to the exact words that must be used by manufacturers of pesticides on their product warnings.

The relevant statute, 7 U.S.C. § 136v(b), provided that although a state may regulate sale and use of federally registered pesticides, "such state shall not impose or continue in effect any requirements labeling or packaging in addition to or different from those required under FIFRA."

In the aviation field, 49 U.S.C. § 41713(d)(1) preemption is less explicit, providing, "a state may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of any carrier that may provide air transportation under this sub-part."

If Congress had intended to preempt state-law failure to warn claims, in the aviation field, it could have easily drafted a statute similar to that in FIFRA, stating a state shall not impose any warning requirements in addition to or different from those required in the Federal Aviation Act. Because our Court of Appeals in the case at bar decided the case on implicit preemption grounds, rather than express preemption grounds, the court did not consider this language. However, such statutes may not be as dispositive of an implied preemption claim as they may be when considering a claim of express preemption the language is still relevant. The Federal Aviation Act affirmatively directs the administrator to promote air safety standards and regulations provide for a number of warnings that must be given to passengers, the same is true in *Bates* in the case of FIFRA.

Thus, this would not be a basis for distinguishing the decision in *Bates*.

Some courts in the DVT cases have noted that a warning that passengers should move about the plane for their safety, to avoid DVT, would directly conflict with federal determinations that, all things considered, passengers are safer in their seats.

Petitioners would argue that is not what the federal determinations concluded. Passengers are safer in their seats, with their seat belts buckled, in rough air and turbulence. In smooth air and good weather there is really no reason for passengers to stay in their seats all the time and those that move about are probably better off to exercise their legs and feet. When conditions would allow, some passengers would prefer, and many passengers would benefit, from walking to the toilet or from standing next to a friend for conversation or conversation with the flight attendants and possibly even the pilots under the appropriate conditions.

In addition, some of the other warnings suggested such as that passengers should wear loose clothing and exercise their calf muscles to promote blood circulation would not conflict with any federal interests.

Thus, in light of the decision in *Bates,* Wisconsin's appeals court's conclusion regarding field preemption is suspect; and because the courts' discussions of conflict preemption are selective, using only alleged failures to warn that do conflict with the FAA determinations as examples, but ignoring those that do not, this conclusion is suspect too.

CONCLUSION

Petitioners believe that the U.S. Supreme Court has never decided the issue of whether commercial airlines should give DVT warnings to passengers. At least, petitioners have been unable to find any Supreme Court cases that directly decide that issue.

Therefore, in light of the new case, *Bates v. Dow Agrosciences LLC* it appears that the cases in the lower courts deciding the DVT issue should be overruled and the Supreme Court should adopt the reasoning of the *Bates* case and hold that respondent Midwest Airlines had a duty to warn the Miezins of the possibility of blood clots (deep venous thrombosis) while airborne on the Midwest Airlines air routes, and Midwest failed to do that.

The failure of Midwest to warn of the dangers of DVT, was a direct and proximate cause of Jerome Miezin's injury and permanent disability resulting from the DVT in his right leg.

Dated at Milwaukee, Wisconsin, Nov. 23, 2005.

Respectfully submitted,

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COURT OF APPEALS
DECISION
DATED AND FILED
May 17, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP868 Cir. Ct. No. 2002CV10249

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

JEROME J. MIEZIN AND PATRICIA MIEZIN,

Plaintiffs-Appellants,

v.

Midwest Express Airlines, Inc.,

Defendant-Respondent

ABC Insurance Company,

Defendant.

(Filed May 17, 2005)

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. At issue in this case is whether a plaintiff can pursue a state common-law negligence claim alleging that an airline negligently failed to warn passengers about the dangers of deep vein thrombosis ("DVT"), or whether such claims are preempted by federal law. Jerome J. Miezin and Patricia Miezin (collectively, "Miezin") appeal from a judgment dismissing their state common-law negligence and loss of consortium claims, respectively, against Midwest Express Airlines, Inc., ("Midwest"). Miezin argues the trial court erroneously granted summary judgment in Midwest's favor after concluding that Miezin's state common-law negligence claim is preempted by federal law and, in the alternative, that Midwest had no duty under Wisconsin common law to warn airline passengers about the dangers of DVT.

¶2 We affirm the judgment because we conclude that Miezin's claim, based solely on a state common-law negligence theory,[1] is impliedly preempted by the Federal Aviation Act of 1958, 49 U.S.C. § 40101, *et seq.* (previously codified at 49 U.S.C. App. § 1301, *et seq.*) ("Federal Aviation Act"). Because we affirm on that ground, we do not consider whether Miezin's claim is also expressly preempted by the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (previously codified at 49 U.S.C. App. § 1305(a)(1)),[2] or whether, in the

[1] Miezin has not alleged that the airline violated a federal standard of care, and we therefore do not address whether he could bring a state law action alleging breach of a federal standard of care. *See* ¶ 19 of this opinion.

[2] The express preemption provision of the Airline Deregulation Act of 1978 provides:

> Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not

(Continued on following page)

absence of preemption, Wisconsin common law would impose on airlines a duty to warn their passengers about the dangers of DVT. *See State v. Blalock*, 150 Wis.2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on the "narrowest possible ground"). Finally, because Miezin does not argue there is any independent basis upon which Patricia's claim for loss of consortium would survive once the state common-law negligence claim is dismissed, we affirm, without discussion, the dismissal of Patricia's claim.

BACKGROUND

¶3 The background facts that formed the basis of Miezin's personal injury claim are largely undisputed. Jerome Miezin traveled on a Midwest flight from Milwaukee to Boston on October 15, 1999, and returned on October 23. Both flights were less than three hours long.

¶4 After his return to Milwaukee, Miezin experienced pain in his leg. On October 27, Miezin was diagnosed with DVT, a clotting condition that develops in the deep veins of the lower extremities. Doctors also determined that Miezin has a "Factor V Leiden" genetic condition which

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enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

See 49 U.S.C. § 41713(b)(1). Miezin cites several cases that addressed whether specific incidents that occurred on airplanes were "services" under the Airline Deregulation Act. Because we decide this case based on implied preemption, we do not address whether the Airline Deregulation Act might also expressly preempt Miezin's claims.

predisposes him to blood clots.[3] It is undisputed that Miezin did not know he had this genetic condition until he was diagnosed with DVT, which occurred after he completed the flights.

¶5 Miezin filed this action, alleging that he has suffered permanent disability and disfigurement as a result of DVT, which he claimed he developed because Midwest negligently failed to advise Miezin that:

> before and during the flights from Milwaukee to Boston and Boston to Milwaukee he should get up out of his seat and move around the cabin of the aircraft and exercise his toes and feet and lower legs and upper legs to promote circulation in those body parts and in failing to advise him to drink liquids and wear loose clothing and avoid stockings or socks with tight elastic below the knees and in failing to advise him to get up and walk about at least once an hour and failing to advise him to massage his toes, feet, ankles, lower legs and knees and exercise his calf muscles to stimulate blood circulation and in failing to advise him to exercise during his flights to promote circulation and . . . was otherwise negligent in failing to provide proper conditions and atmosphere for [Miezen [sic]].

In other words, as Miezen [sic] explains in his brief, he alleged that Midwest failed to inform passengers about the dangers of DVT arising from airline travel.

¶6 Midwest moved for summary judgment. The trial court granted the motion, concluding that Miezin's state

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[3] According to one of Miezin's experts, Factor V Leiden is present in four to six percent of the general population.

common-law negligence claim is preempted by the Federal Aviation Act and, in the alternative, that Midwest had no duty under Wisconsin common law to warn airline passengers about the dangers of DVT. This appeal followed.

STANDARD OF REVIEW

¶7 We review summary judgment *de novo*, applying the same method as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶ 20-24, 241 Wis. 2d 804, 623 N.W.2d 751.

DISCUSSION

¶8 Miezin argues that his state common-law negligence claim is not preempted by federal law and that under Wisconsin's common law, Midwest had a duty to warn its passengers about the dangers of DVT.[4] We conclude that Miezin's claim is impliedly preempted by the Federal Aviation Act and, therefore, affirm the judgment.

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[4] Miezin also argues that he has established all of the factual elements of his negligence claim. Because we affirm the judgment on federal preemption grounds, we do not address Miezin's factual argument or the discovery materials offered in support of Miezin's claim.

¶9 "A fundamental principle of the Constitution is that Congress has the power to preempt state law." ***Crosby v. National Foreign Trade Council***, 530 U.S. 363, 372 (2000) (citation omitted). However, analysis of preemption claims begins with the presumption that "Congress does not intend to supplant state law." ***New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.***, 514 U.S. 645, 654 (1995).

¶10 The United States Supreme Court has recognized three methods by which Congress can exercise its preemptive power: express preemption, implied field preemption, and implied conflict preemption. Express preemption occurs when Congress enacts an express provision for preemption in any congressional act. *See* ***Crosby***, 530 U.S. at 372. Under implied field preemption, Congress can impliedly preempt state law if "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." ***Cipollone v. Liggett Group, Inc.***, 505 U.S. 504, 516 (1992) (internal quotation marks and citations omitted). Finally, implied conflict preemption will be found "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." ***Gade v. National Solid Wastes Mgmt. Ass'n***, 505 U.S. 88, 98 (1992) (internal quotation marks and citations omitted).

¶11 Numerous courts have addressed whether the Federal Aviation Act impliedly preempts state common-law negligence claims brought by airline passengers. In one such case, the Third Circuit Court of Appeals found implied federal preemption of "the entire field of aviation safety." *See* ***Abdullah v. American Airlines, Inc.***, 181 F.3d 363, 365 (3d Cir. 1999). At issue in ***Abdullah*** was an

allegation that American Airlines was liable under territorial (Virgin Islands) common law for injuries passengers sustained when their aircraft encountered severe turbulence. ***Id.*** The passengers alleged that the pilot and the flight crew were negligent in failing to avoid the turbulent conditions and to "give warnings reasonably calculated to permit plaintiffs to take steps to protect themselves." ***Id.*** (footnote omitted).

¶12 The court concluded that "the [Federal Aviation Act] and relevant federal regulations establish complete and thorough safety standards for interstate and international air transportation that are not subject to supplementation by, or variation among, jurisdictions." ***Id.*** at 367. The court explained: "[B]ecause of the need for one, consistent means of regulating aviation safety, the standard applied in determining if there has been careless or reckless operation of an aircraft, should be federal; state or territorial regulation is preempted." ***Id.*** at 372. Nonetheless, the plaintiffs were not barred from pursuing state and territorial law remedies based on allegations that federal standards of care were violated. *See* ***id.*** at 375. The court held: "Even though we have found federal preemption of the standards of aviation safety, we still conclude that the traditional state and territorial law remedies continue to exist for violation of those standards." ***Id.***

¶13 Not all courts have taken such a broad view of federal preemption of air safety standards. Indeed, some have explicitly declined to follow ***Abdullah***. *See, e.g.*, ***Sakellaridis v. Polar Air Cargo, Inc.***, 104 F. Supp. 2d 160 (E.D.N.Y. 2000) (recognizing that the Second Circuit, in contrast to the Third Circuit, has held that the Federal Aviation Act does not preempt state common-law claims). The Seventh Circuit Court of Appeals has not considered

Abdullah, although two district court decisions have observed that the Seventh Circuit has acknowledged broad preemption by the Federal Aviation Act in other contexts. *See* ***Deahl v. Air Wisconsin Airlines Corp.***, No. 03C5150, 2003 WL 22843073, at *2 (N.D. Ill. Nov. 26, 2003) ("[T]here is dicta, in the Seventh Circuit, stating tort claims based on inadequate equipment are preempted.") (citing ***Bieneman v. City of Chicago***, 864 F.2d 463, 471 (7th Cir. 1988)); ***In re Lawrence W. Inlow Accident Litigation***, No. IP 99-0830-C H/G, 2001 WL 331625, at *15 n. 11 (S.D. Ind. Feb. 7, 2001) ("The Seventh Circuit has not addressed [Federal Aviation Act] preemption recently, although it has acknowledged the broad preemptive scope of the [Act] in a different context.") (citing ***Kohr v. Allegheny Airlines, Inc.***, 504 F.2d 400, 404 (7th Cir. 1974)).[6]

¶14 Although there are conflicts among courts in the general application of implied preemption by the Federal Aviation Act, the only two cases of which we are aware that involved DVT warnings to airline passengers found implied preemption of state common-law standards of care. *See* ***Witty v. Delta Air Lines, Inc.***, 366 F.3d 380 (5th Cir. 2004); and ***In re Deep Vein Thrombosis Litigation***, No. MDL 04-1606 VRW, *et al.*, 2005 WL 591241 (N.D. Cal. Mar. 11, 2005).

¶15 ***Witty*** was the first case to address the preemption issue with respect to DVT warnings, and involved

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[6] "We may cite to unpublished opinions from other jurisdictions." ***Burbank Grease Servs., LLC v. Sokolowski***, 2005 WI App 28, ¶ 22 n. 10, ___ Wis. 2d ___, 693 N.W.2d 89, (citing ***Predick v. O'Connor***, 2003 WI App 46, ¶ 12 n. 7, 260 Wis. 2d 323, 660 N.W.2d 1). We do so in this opinion because we have examined several federal district court cases for their persuasive value.

facts similar to those presented in the instant case. Milton Witty claimed that he developed DVT while on a Delta flight from Louisiana to Connecticut. 366 F.3d at 381. He alleged that Delta negligently failed to warn passengers about the risks of DVT, provide adequate leg room and allow passengers to exercise their legs. *Id.* at 382. With respect to the failure-to-warn allegation, the Fifth Circuit concluded that "field preemption and conflict preemption are both applicable, because there exists a comprehensive scheme of federal regulation, and the imposition of state standards would conflict with federal law and interfere with federal objectives." *Id.* at 384. "Congress intended to preempt state standards for the warnings that must be given airline passengers." *Id.* at 383.

¶16 *Witty*'s analysis was based on its recognition that there are numerous federal regulations affecting warnings and instructions that must be given to airline passengers. *See id.* at 384. The regulations require, for example, "no smoking" placards, "fasten seat belt" signs and specific oral briefings that must be provided on each flight. *Id.* Based on these regulations, *Witty* held:

> [F]ederal regulatory requirements for passenger safety warnings and instructions are exclusive and preempt all state standards and requirements. Congress enacted a pervasive regulatory scheme covering air safety concerns that includes regulation of the warnings and instructions that must be given airline passengers. . . .
>
> Allowing courts and juries to decide under state law that warnings should be given in addition to those required by the Federal Aviation Administration would necessarily conflict with the federal regulations. In this case, the conflict is more than theoretical, since Witty claims that a DVT

> warning should have been given, while federal regulations do not require such a warning. And any warning that passengers should not stay in their seats, but should instead move about to prevent DVT, would necessarily conflict with any federal determination that, all things considered, passengers are safer in their seats. . . .
>
> Moreover, warnings by their nature conflict, in the sense that the import of one warning is diluted by additional warnings that might be imposed under state law. . . .

Id. at 385 (footnotes and citations omitted).

¶17 The court in ***DVT Litigation*** essentially agreed with ***Witty***'s conclusion and analysis.[6] 2005 WL 591241, at *10-13. The court noted that "'the whole tenor of the [Federal Aviation Act] and its principal purpose is to create and enforce *one unified system* of flight rules.'" ***Id.*** at *12 (citing ***United States v. Christensen***, 419 F.2d 1401, 1404 (9th Cir. 1969)) (emphasis supplied by ***DVT Litigation***). "[T]o this end, the [Federal Aviation Administration] Administrator has enacted a large number of federal regulations governing the warnings and instructions that must be given to airline passengers." ***DVT Litigation***, 2005 WL 591241, at *12. The court added:

> Moreover, state-law suits based upon a failure to warn of DVT would most certainly lead to non-uniformity (anathema to the [Federal Aviation Act]), for each time a state jury sustains a

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[6] In ***In re Deep Thrombosis Litigation***, the court appeared to base its holding solely on implied field preemption, rather than on both implied field and implied conflict preemption. *See* No. MDL 04-1606 VRW, *et al.*, 2005 WL 591241, *14 (N.D. Cal. Mar. 11, 2005).

> failure to warn challenge, airline defendants would be forced to amend their pre-flight warnings to avoid future liability. Moreover, such state law verdicts could be inconsistent amongst themselves. For example, a jury in Arkansas might find that an airline's oral warning of DVT risks insufficient because a reasonably prudent airline would have displayed a video warning demonstrating potential preventative measures is required. A jury in California, however, could find that an oral warning before take-off is sufficient while a jury in Texas could find that an oral warning of DVT prior to take-off is insufficient unless repeated at least three hours into the flight. Juries in the other forty-seven states could reach similar or drastically different results when presented with the same question.

Id. at *13.

¶18 Like the court in ***DVT Litigation***, we agree with the reasoned and well-articulated analysis offered in ***Witty***.[7] "[Implied f]ield preemption and conflict preemption are both applicable, because there exists a comprehensive scheme of federal regulation, and the imposition of state standards would conflict with federal law and interfere with federal objectives." ***Witty***, 366 F.3d at 384. The pervasive regulations concerning the warnings that must

[7] We conclude that *Witty v. Delta Air Lines, Inc.*, 366 F.3d 380 (5th Cir. 2004), is directly on point, and decline to address other cases discussed by the parties that involve incidents that took place during international travel, which are governed under what is commonly referred to as the Warsaw Convention, *see* 49 U.S.C. § 40105, and cases involving the potential application of the express federal preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (previously codified at 49 U.S.C. App. § 1305(a)(1)).

be given to airline passengers indicate that "Congress left no room for the States to supplement" these regulations. *See* ***Cipollone***, 505 U.S. at 516. If state requirements for announcements to airline passengers were not impliedly preempted by the Federal Aviation Act, each state would be free to require any announcement it wished on all planes arriving in, or departing from, its soil. It is hard to see how the amalgam of potentially conflicting messages promoting competing states' interests would not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See* ***Gade***, 505 U.S. at 98 (internal quotation marks and citations omitted). Thus, on the narrow topic before us – warnings that are given to airline passengers – we conclude that the Federal Aviation Act impliedly preempts the application of state common-law negligence standards to failure-to-warn claims like that presented here.

¶19 In addition, like the court in ***Witty***, "we need not decide whether a state claim for failure to warn passengers of air travel risks is entirely preempted, or, as [the Third Circuit] held, is preempted to the extent that a federal standard must be used but that state remedies are available." *See* 366 F.3d at 385 (footnote omitted). This is because Miezin, as he explicitly recognizes in his brief, is not claiming that Midwest violated any federal standards in failing to give a warning about DVT. Because Miezin's claim is based solely on the alleged breach of state common-law standards of care, which we conclude are impliedly preempted in this case, we affirm the grant of summary judgment in Midwest's favor.

By the Court. – Judgment affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 4	MILWAUKEE COUNTY

JEROME J. MIEZIN and PATRICIA MIEZIN,

Plaintiffs,

v.

MIDWEST EXPRESS AIRLINES, INC. and ABC INSURANCE COMPANY,

Defendants.

Case No. 02-CV-010249

Case Code: 30107

JUDGMENT

(Filed Feb. 17, 2004)

The above-captioned matter having been heard on 10th of November, 2003, on Midwest Express Airlines, Inc.'s Motion for Summary Judgment; now, pursuant to the Court's Order for Judgment rendered on February 11, 2004,

IT IS ADJUDGED AND DECREED AS FOLLOWS:

That for the reasons stated on the record on November 10, 2003 and set forth in the Order for Judgment rendered on February 11, 2004, judgment is entered in favor of the defendants, Midwest Express Airlines, Inc., and against the plaintiffs, Jerome J. Miezin and Patricia Miezin with Prejudice.

Dated this 17th day of February, 2004.

BY THE COURT:
BY THE COURT
JOHN BARRETT
CLERK OF CIRCUIT COURT
BY: /s/ Mary Dean
Clerk of Circuit Court
JUDGMENT CLERK

STATE OF WISCONSIN	CIRCUIT COURT BRANCH 4	MILWAUKEE COUNTY

JEROME J. MIEZIN and PATRICIA MIEZIN,

Plaintiffs,

vs.

MIDWEST EXPRESS AIRLINES, INC. and ABC INSURANCE COMPANY,

Defendants.

Case No. 02CV010249

ORDER FOR JUDGMENT

(Filed Feb. 11, 2004)

The above-captioned matter, having come on for hearing on the 10th day of November, 2003, the plaintiffs, having appeared by Attorney James P. Brennan, and defendant, MIDWEST AIRLINES, INC. ("Midwest"), f/k/a Midwest Express Airlines, Inc., having appeared by its attorneys, Pietragallo, Bosick & Gordon and Quarles & Brady LLP, on the motion of Midwest for summary judgment.

This Court, having examined the record, reviewed the briefs submitted by counsel, and after hearing oral argument on this summary judgment motion, finds that federal law establishes the applicable standard of care in this instance. Abdullah v. American Airlines, 181 F.3d 383 (3rd Cir. 1999).

In this case, there is no evidence that Midwest failed to comply with federal aviation standards in its operation

of the flight in question. Accordingly, there is no genuine issue of material fact, and plaintiffs have failed to present sufficient evidence to establish the essential elements of this cause of action.

While the Court has examined the matter under federal law, plaintiffs contend that a state common law negligence standard should apply. Even if this Court were to look to state law, this Court finds that there exists no duty on the part of a commercial air carrier like Midwest to warn or protect passengers from health risks or injuries that develop as a result of a passenger's idiosyncratic reaction to the normal conditions of air travel.

THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. That the Federal Aviation Act and its regulations preempt state common law standards of care;

2. That there is not evidence of a breach or violation of any federal standard of care by Midwest in connection with the operation of this flight;

3. That no common law duty to warn exists which would require a commercial carrier to warn passengers of the health risks that could develop as a result of one's idiosyncratic reaction to ordinary air travel;

4. That plaintiffs have failed to present any evidence of a breach of any legal duty on the part of Midwest; and,

5. That no genuine issue of material fact exist, and summary judgment is warranted in favor of defendant Midwest Airlines.

Therefore, plaintiffs' case is dismissed with prejudice, and the defendant is awarded taxable costs and disbursements.

Dated: February 11, 2004

By the Court:

/s/ Mel Flanagan
Hon. Mel Flanagan
Circuit Court Judge

[SEAL]

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August 25, 2005

To:

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You are hereby notified that the Court has entered the following order:

No. 2004AP868 Miezin v. Midwest Express Airlines L.C. #2002 CV010249

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiffs-appellants-petitioners, Jerome J. Miezin and Patricia Miezin, and considered by this court;

IT IS ORDERED that the petition for review is denied, with $50 costs.

Cornelia G. Clark
Clerk of Supreme Court

No. 05-675

IN THE

Supreme Court of the United States

JEROME J. MIEZIN and PATRICIA MIEZIN,

Petitioners,

v.

MIDWEST EXPRESS AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS, DISTRICT I

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether any compelling reason exists to grant a Writ of Certiorari where the decisions of the Wisconsin courts recognizing the preemptive effect of the Federal Aviation Act on this particular claim is consistent with this Court's precedent and with the decisions of every other court that has addressed the issue?

2. Whether any compelling reason exists to grant a Writ of Certiorari where the record establishes that state law would provide no remedy to the Petitioners even if this particular claim were not preempted?

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6

Respondent, Midwest Airlines, Inc., is a wholly owned subsidiary of Midwest Air Group, Inc., a company publicly traded on the New York Stock Exchange. ABC Insurance Company named as a respondent in the Petition, does not exist.

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SUMMARY OF ARGUMENT

The Petitioners claim that Jerome Miezin developed deep vein thrombosis ("DVT") following a commercial flight operated by Midwest Airlines, Inc. ("Midwest"). A common law negligence claim was presented in Wisconsin state court which was predicated on a single theory of liability – that Midwest failed to provide passengers such as Mr. Miezin with in-flight warnings of the risk of DVT and in-flight safety information and instructions aimed at minimizing the potential for developing DVT.

The trial court granted summary judgment in favor of Midwest for two (2) reasons. First, the court found that the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 740 (codified as amended at 49 U.S.C. §§ 40101-49112 (1997 & Supp. 2005)), impliedly preempted any failure to warn claim predicated on a theory that passenger safety information and warnings were inadequate. (Pet. App. at 16.) In addition, the court found that a commercial air carrier such as Midwest had no duty under Wisconsin law to warn passengers of health risks that might develop as a result of a passenger's idiosyncratic reaction to the normal conditions of air travel. (Pet. App. at 16.) Thus, even if the claim were not preempted, the trial court found that no cause of action existed under state law. (Pet. App. at 16.)

The Wisconsin Court of Appeals affirmed the judgment in favor of Midwest (Pet. App. at 1; *Miezin v. Midwest Express Airlines, Inc.*, 701 N.W.2d 626 (Wis. Ct. App. 2005)), and the Wisconsin Supreme Court denied the Miezins' Petition for Review on August 25, 2005, (Pet. App. at 18; *Miezin v. Midwest Express Airlines*, 703 N.W.2d 377 (Wis.

2005)). Midwest submits that no justification exists to disturb the judgment of the Wisconsin courts and no compelling reason exists to grant certiorari.

The federal interest in flight safety is long-standing and pervasive, going back to the advent of commercial aviation. Thus, there exists no assumption of non-preemption that applies to this case. Instead, state laws must be preempted to the extent they are inconsistent with the objectives Congress sought to achieve in enacting the Federal Aviation Act. *See, e.g., United States v. Locke*, 529 U.S. 89, 108 (2000). A principal objective of Congress in enacting the Federal Aviation Act was to centralize in a single agency "the power to frame rules for the safe and efficient use of the nation's airspace," *Air Line Pilots Ass'n Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960), and "to create and enforce one unified system of flight rules," *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969). Pursuant to the authority conferred by Congress, the Administrator of the Federal Aviation Administration has promulgated regulations setting forth in detail the in-flight safety warnings and instructions carriers must give passengers. Accordingly, state laws imposing a duty upon carriers to provide warnings or instructions concerning DVT are preempted because federal law completely occupies the field of in-flight safety warnings. Moreover, permitting each of the fifty states to add to or supplement the warnings or instructions mandated by the Federal Aviation Administration conflicts with the Congressional objectives of centralizing in-flight rulemaking authority in a single agency and of creating a unified body of in-flight safety rules. For these reasons, the decision of the Wisconsin courts was proper and no basis exists to warrant further review.

Even in the absence of preemption, state law would provide no remedy for the injuries alleged by the Petitioners. The trial court examined relevant case law and determined that no duty could be imposed upon air carriers under state common law to warn individual passengers about the alleged risks of otherwise normal air travel. Because an adequate and independent alternative basis under state law supports the judgment of the Wisconsin courts, no compelling reason exists to justify review of this matter and the Petition for a Writ of Certiorari must be denied.

COUNTER-STATEMENT OF THE CASE

Petitioners, Jerome and Patricia Miezin were ticketed passengers on round-trip flights operated by Midwest from Milwaukee, Wisconsin to Boston, Massachusetts. Four (4) days after walking off his return flight, a blood clot was discovered in Mr. Miezin's lower right leg. Miezin was diagnosed with DVT and it was determined that he suffered from an uncommon genetic condition that predisposed him to developing DVT.

In this lawsuit, the Miezins claim that Midwest is liable for the damages they sustained as a result of the development of this condition. Ironically, the Miezins seek to hold Midwest liable though nothing unusual or out of the ordinary occurred on these flights. For instance, no evidence suggests that Mr. Miezin's DVT developed after he fell during the boarding process. Nor does the record indicate that Miezin developed DVT after his leg was bumped or struck while sitting on the aircraft. Instead, this lawsuit seeks to hold Midwest liable for a medical condition – diagnosed four (4) days after the flight – which allegedly developed simply because Mr. Miezin sat on an aircraft during a routine flight from Boston to Milwaukee.

The Miezins sought damages based solely on a negligence theory under Wisconsin common law. Specifically, they allege that Midwest negligently failed both to warn passengers of the risk of DVT and to provide in-flight instructions on the measures which might be taken to minimize this risk. The Miezins did not contend that Midwest violated any federal law in connection with the operation of these flights. To the contrary, the only evidence presented to the trial court established that Midwest's operations were conducted in accordance with federal law and that Midwest provided its passengers with the in-flight safety warnings and briefings required by the Federal Aviation Administration.

The Circuit Court of Milwaukee County granted Midwest's Motion for Summary Judgment and dismissed this action. In doing so, the trial court held that the Federal Aviation Act and its regulations preempt state common law standards of care and that summary judgment was warranted because there was no "evidence of a breach or violation of any federal standard of care by Midwest in connection with the operation of this flight." (Pet. App. at 16.) Further, regardless of preemption, the trial court found that the Miezins could not succeed on their negligence claim as a matter of law. In the words of the trial court:

> Even if this Court were to look to state law, this Court finds that there exists no duty on the part of a commercial air carrier like Midwest to warn or protect passengers from health risks or injuries that develop as a result of the passenger's idiosyncratic reaction to the normal conditions of air travel.

(Pet. App. at 16.)

The Wisconsin Court of Appeals unanimously affirmed on the ground that the failure to warn claim was preempted by the Federal Aviation Act.[1] Adopting the reasoning of the United States Court of Appeals for the Fifth Circuit in *Witty v. Delta Airlines, Inc.*, 366 F.3d 380 (5th Cir. 2004), and of the District Court for the Northern District of California in *In re Deep Vein Thrombosis Litigation*, No. 04-1606 VRW, 2005 U.S. Dist. LEXIS 4043 (N.D. Cal. Mar. 11, 2005), the Wisconsin Court of Appeals held:

> Like the court in *DVT Litigation*, we agree with the reasoned and well-articulated analysis offered in *Witty*. '[Implied f]ield preemption and conflict preemption are both applicable, because there exists a comprehensive scheme of federal regulation, and the imposition of state standards would conflict with federal law and interfere with federal objectives.' The pervasive regulations concerning the warnings that must be given to airline passengers indicate that 'Congress left no room for the States to supplement' these regulations. If state requirements for announcements to airline passengers were not impliedly preempted by the Federal Aviation Act, each state would be free to require any announcement it wished on all planes arriving in, or departing from, its soil. It is hard to see how the amalgam of potentially conflicting messages

1. The Court of Appeals stated that "[b]ecause we affirm on that ground, we do not consider whether Miezin's claim is also expressly preempted by . . . the Airline Deregulation Act of 1978 . . . or whether, in the absence of preemption, Wisconsin common law would impose on airlines a duty to warn their passengers about the dangers of DVT." (Pet. App. at 2-3.)